United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

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No. 74-1035

United States Court of Appeals

FOR THE SECOND CIRCUIT

LODGES 700, 743 AND 1746,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

AND

UNITED AIRCRAFT CORPORATION, *Intervenor.*

On Petition To Review An Order of the National Labor Relations Board

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BRIEF FOR INTERVENOR UNITED AIRCRAFT CORPORATION

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INDEX

TABLE OF AUTHORITIES

CASES:

Page

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STATEMENT OF THE CASE

This matter is before the Court upon the Petition of the Charging Parties, International Association of Machinists and Aerospace Workers, AFL-CIO, Lodges 700, 743 and 1746, to review an order of the National Labor Relations Board issued July 10, 1973, in a case involving the Intervenor (the Company) known as *United Aircraft Corporation, Pratt & Whitney and Hamilton Standard Divisions,* 204 NLRB No. 133 (J.A. 841-856).

The case involved a scatter-gun complaint of (1) alleged minor instances of harassment of union and shop stewards, (2) alleged refusals to provide shop stewards to employees upon their request, (3) alleged failure to give the Unions timely notice of layoffs, and (4) alleged refusals to provide the Unions with information in the course of processing merit rating services (J.A. 796).

The Trial Examiner (now Administrative Law Judge) rejected the Company's position that the issues raised by the complaint should be deferred to arbitration on the basis of the Board's decision in *Collyer Insulated Wire,* 192 NLRB 837 (1971), and proceeded to decide the case on its merits (J.A. 796). Accordingly he dismissed the vast majority of the allegations. Specifically he dismissed eighty percent (80%) of the harassment and discrimination allegations (J.A. 796-802, 804-806).[1] With respect to related discrimination allegations involving employees Raymond and Sullivan, the Trial Examiner upheld the allegation as to Raymond's suspension and effectively dismissed a similar charge involving Sullivan on the basis of an intervening arbitration award (J.A. 801-804, 845).

The Trial Examiner dismissed in its entirety the allegation charging an unlawful refusal to notify the Unions in a timely manner of impending layoffs (J.A. 806-807). Concerning the three incidents from which four allegations of refusals to provide employees with shop stewards were derived, the Trial Examiner upheld one such allegation (J.A. 808), dismissed one outright (J.A. 807-808) and effectively dismissed the remaining two based upon a decision and award in an intervening arbitration (J.A. 808).

On the issue of alleged refusals to provide the Unions with information in the course of processing merit rating grievances, the Trial Examiner ruled: (1) that there was no refusal by the Company to supply the Unions with the standards used by foremen in merit ratings (J.A. 808-809, 813); (2) that there was no unlawful refusal by the Company to supply the Unions with records at the first step of the grievance procedure because the Unions had waived the right to obtain records at that step under the collective

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[1] The harassment allegations of the complaint dismissed by the Trial Examiner were paragraphs 7(a), (b), (c), (d), (h), (i), (j), (k), (m), (n), (p), (q), (r), (s), (t), (u), (x) and (y). The harassment charges upheld by the Trial Examiner were paragraphs 7(e), (f), (g), (l), and (o). (J.A. 446, 479, 489, 493; G.C. Exh. 1(c), (n), (v), (z)).

bargaining agreement (J.A. 814); but (3) that the Company unlawfully refused to provide the Unions with certain records at the second step of the grievance procedure (J.A. 814-816).

Upon exceptions filed to the Trial Examiner's Decision, the Board dismissed the Complaint without passing upon the merits of the controversy, "[h]aving found that the parties' contractual grievance-arbitration process can, and does, function effectively and fairly and has continued to be utilized by the parties to their satisfaction, '[and believing] it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures.'" (J.A. 848.) However, "[i]n order to eliminate the risk of prejudice to any party," the Board retained "jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either "(a) the dispute has not with reasonable promptness . . . either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act." (J.A. 848-849.)

In order to properly perceive the trivial character of the allegations involved in this proceeding, it is necessary, as the Board stated (J.A. 844), to view them in the perspective of the vastness of the Company's operations, and particularly within the context of the immense work force and supervisory staff of this employer.

United Aircraft Corporation is a multiple division company, employing some 60,000 employees in the United States and Canada (J.A. 219; Tr. 1667). Among its principal products are aircraft engines, aircraft propellers, fuel controls for aircraft engines, rocket engines for space vehicles,

helicopters and various electronic hardware utilized in the aircraft and space industries.

The Corporation is organized into nine major divisions: the Pratt & Whitney Aircraft Division which is the largest, the Sikorsky Division, the Hamilton Standard Division, United Aircraft Research Laboratories, United Aircraft International, Norden Division, Unisem Division, United Technology Center and United Aircraft of Canada (J.A. 218-220; Tr. 1667-1669).

The two Divisions involved in this case—the Windsor Locks plant of the Hamilton Standard Division and the East Hartford and Middletown plants of the Pratt & Whitney Division—are the largest within the Company. The scope of operations in these plants is immense and resembles "a huge job shop" where no straight line production exists, in contrast to most major manufacturing facilities such as those in the automobile industry. This is due in part to the highly sophisticated nature of the products produced and the fact that these Divisions reserve to themselves all inspection, assembly, subassembly and test operations of the final product (J.A. 226; Tr. 1676).

Specifically, 23,811 workers are employed at the East Hartford facility which occupies 5,757,495 square feet of building space located on a tract of land of nearly 1,000 acres. Of these 23,811 employees, 484 are group supervisors and assistant foremen, 607 are foremen and 167 are general foremen. Three thousand six hundred thirty six (3,636) employees work at the Middletown plant which occupies 1,943,974 square feet on a tract of land in excess of 1,000 acres. Of these 3,636 employees, 75 are group supervisors and assistant foremen, 124 are foremen and 36 are general foremen. At the Windsor Locks plant 4,735 employees work at a facility occupying 1,651,239 square feet, located on a tract of land of 317 acres. Of these 4,735 employees, 127 are foremen and 36 are general foremen (J.A. 711, 844; Resp. Exhs. 14(a), (d), 15(a), 16(a), (b), (c)).

The Board correctly determined that "[i]t is in this context of a sizeable employee population that we must examine the allegations in this case [as well as] . . . the unfair labor practices previously found to have been committed by Respondent. . . ." (J.A. 844.) Viewed in the perspective of the vastness of the Company's operations, including the size of its work force and supervisory staff, "the proportion of allegedly offending supervisors and the nature of the allegations are minor indeed" (J.A. 845).

THE HISTORY OF LITIGATION BETWEEN THE PARTIES AND THE ROLE PLAYED BY THE BOARD'S GENERAL COUNSEL

Prior to 1960 the Company and the Unions enjoyed an amicable relationship extending back to 1946. *United Aircraft Corporation,* 134 NLRB 1632, 1633 (1961) (J.A. 852, n. 11). However, during 1960 the Unions conducted a massive but unsuccessful strike against the Company, marked by premeditated Union violence and harassment of employees who sought to work during the strike. The Unions' strike tactics resulted in a multi-million dollar judgment against the Unions. *United Aircraft Corp.* v. *Machinists, et al.,* 161 Conn. 79, 285 A.2nd 330, 77 LRRM 2436 (1971), *cert. denied,* 404 U.S. 1016.

In an attempt to salvage the disastrous consequences of its strike action, the Unions filed massive unfair labor practice charges with the Board seeking to challenge practically every aspect of the Company's labor relations back to the early 1950's. The filing of massive charges by the Unions after an unsuccessful strike was not particularly unusual. What was highly unusual was the response of the Board's General Counsel. Rather than exercise its discretion to issue a complaint on aspects of the charges, if any, raising serious issues of a probable violation of the Act, the Board's General Counsel embarked on a course of conduct that has now continued over a decade and persists to the Complaint involved in the present case. That course of conduct was the issuance of complaints that are

largely nothing more than a mirror of the charges filed. Thus, the Complaint issued by the General Counsel in the case directly growing out of the 1960 strike was so massive and unwieldy that it took from May 16, 1963 to June 11, 1968 to hear. The Complaint was little more than a tool for discovery to determine whether there was any evidence at all to sustain the all-inclusive charges.[2] The Company was finally vindicated by the Board eleven years after proceedings were instituted against it. *United Aircraft Corporation*, 192 NLRB 382 (1971).[3] Meanwhile, the Unions took advantage of the albatross of these massive unfair labor practice charges, which hung about the neck of the Company for more than a decade, to press numerous additional charges which the Board's General Counsel almost automatically translated into complaints. The Unions cite selective cases arising from these charges and complaints (U. Typewritten Br. 5-8) in an attempt to bootstrap their position that the Board's *Collyer* deferral policy should not be applied to the instant case. However, the entire course of litigation between the Parties during this period, summarized below, fails to show hostility toward employees' exercise of rights protected by the Act, and requires this Court to find that the Board acted within its discretion in deferring this case to arbitration.

What it shows at most is that every move of the thousands of the Company's supervisors have been microscopically monitored over a period of years and the Unions have filed unfair labor practice charges over every perceived injustice. Those charges have been simply collected and dumped indiscriminately into complaints periodically by

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[2] Indeed, Trial Examiner Best, with the acquiescence of the Board, determined that "[i]t was apparent from the outset such allegations were wantonly made without description or proof." *United Aircraft Corporation*, 192 NLRB at 441-442.

[3] This matter is now before this Court upon the petition of the Union in Case No. 72-1935 *et al.*

the General Counsel. In this background some of the charges are bound to be upheld by the laws of arithmetic. By their overblown rhetoric and repetition of the perjorative words "antiunion," "recidivist" and the like, the Petitioner Unions woefully overstate the pittance of the charges sustained and totally ignore the far greater number of instances where the General Counsel's complaints or portions thereof have been found to be wholly without merit.

1. *United Aircraft Corporation,* 134 NLRB 1632 (1961). In this case the Board dismissed in its entirety, a complaint which was based upon Union charges that the Company violated the Act by prohibiting employees from wearing inflammatory buttons which resurrected the bitterness of the recently ended strike.

2. *United Aircraft Corporation,* 144 NLRB 492, 54 LRRM 1095 (1963), *pet to set aside denied,* 332 F.2d 784 (2nd Cir. 1964), *enf'd.,* 333 F.2d 819 (2nd Cir. 1964), *cert. denied,* 380 U.S. 910. In this proceeding this Court upheld the Board's dismissal of that portion of the complaint alleging that the Company unlawfully refused to permit the Union President to be excused during his working hours to confer with a Board agent. This Court also upheld the Board's decision that school trainees were properly included in the unit appropriate for bargaining, finding that the Company position was taken in complete good faith and was the recognized method of testing an appropriate unit determination. 333 F.2d at 822.

3. *United Aircraft Corporation,* 168 NLRB 480, 67 LRRM 1010 (1967), *enforcement denied,* 416 F.2d 809 (D.C. Cir. 1967), *cert. denied,* 396 U.S. 1058. The District of Columbia Circuit reversed the Board's decision in this case and found that the Company had been privileged to refuse to bargain with the Union based upon its good faith doubt as to the Union's majority status. While this complaint was pending, however, an injunction was procured by the General Counsel which required the Company to continue to recog-

nize the Union. *Hoban* v. *United Aircraft Corp.*, 264 F. Supp. 645, 63 LRRM 2081 (D. Conn. 1966). The injunction was dismissed after the Company entered into collective bargaining agreements with the Unions pursuant to the recognition required by the injunction. *Cf. Hoban* v. *United Aircraft Corporation*, 66 LRRM 2134 (D. Conn. 1967).

4. *United Aircraft Corporation*, 179 NLRB 935, 72 LRRM 1955 (1969) and 180 NLRB 278, 73 LRRM 1545 (1969), *enf'd*, 440 F.2d 85 (2nd Cir. 1971). In these proceedings, known as the *Weil* and *Peterson* cases, the Court upheld the Board's finding that some fifteen employees interspersed among five plants of the Company had been harassed by foremen or investigators because of their union activity. The individual incidents complained of took place over a two-year period and are now six to eight years old.

5. *United Aircraft Corporation*, 181 NLRB 892, 75 LRRM 1443 (1970), *enf'd* 434 F.2d 1198 (2nd Cir. 1970). In this case the Board found that the Company was required to furnish the Union with a list of the names and addresses of employees in the bargaining units.

6. *United Aircraft Corporation*, 188 NLRB 633, 76 LRRM 1405 (1971). The Board found in this proceeding, known as the *Sherman* case, that the Company had unlawfully suspended a single steward based upon an employee's attempt to deliver union authorization cards to the steward during working hours.

7. *United Aircraft Corporation*, 192 NLRB 382, 77 LRRM 1785 (1971). This was the original case emanating from the 1960 strike and alleging massive violations of the Act. As stated above, the Board largely exonerated the Company of any wrongdoing in this case despite the massive nature of the complaint, the five years spent in hearings and the eleven years consumed by pre-trial investigation, actual trial, motions and briefs—eventually culminating in a Board decision in 1971. This decision also affirmed the

Board's faith in the Parties' ability to successfully settle disputes between them through arbitration—even in the face of this massive complaint. Thus the Board deemed arbitration awards dispositive of the reinstatement rights of economic strikers whom the Company accused of strike misconduct and whose cases were submitted to arbitration by the Union and the Company. 77 LRRM at 1793. Although the Unions have attacked almost every aspect of the Board's decision in that case (*supra*, p. 6), they have not argued that these arbitrations did not resolve these disputes in conformity with the Act.

8. *United Aircraft Corporation*, 199 NLRB No. 68, 81 LRRM 1397 (1972), *modified* 490 F.2d 1105 (2nd Cir. 1973). In the most recent case involving these parties, the Court enforced a Board finding that a wage increase which the Company believed to be a negotiable matter had been unlawfully withheld. Both the Trial Examiner and the Court determined that the wage withholding did not occur in the context of bad faith bargaining or any other unlawful conduct. Specifically the Trial Examiner stated "[a]lthough I find the withholding of the wage increase . . . violative . . . of the Act, under all the circumstances, I do not deem the conduct egregious, or reflective of a will on the part of the [Company] to deprive employees of their Section 7 rights on any broad scale" (199 NLRB No. 68, TXD 13). And this Court enforced this finding while acknowledging that there was no evidence of anti-union motivation (490 F.2d at 1110).

Juxtaposed against this history of nearly continuous complaints issued by the Board's General Counsel on the behalf of the Unions since 1960 has been the Unions' persistent, although unsuccessful, resistance to abide by their contractual obligations and submit their disputes with the Company to final and binding arbitration. The Company has consistently sought to de-escalate the "trial-by-combat" theory of labor relations, espoused by the Unions by

channelling its disputes into the grievance and arbitration process rather than the prolonged and legalistic process of Board proceedings and Court reviews. To achieve this end the Company has been required to invoke the Courts' processes in order to compel the Unions to arbitrate and resolve existing disputes. *United Aircraft Corp.* v. *Canel Lodge 700, I.A.M.* 314 F. Supp. 371 (D. Conn. 1970), *enf'd* 436 F.2d 1 (2nd Cir. 1970), *cert. denied,* 402 U.S. 908; *United Aircraft Corp.* v. *Lodge 743, I.A.M.,* 77 LRRM 3136 (D. Conn., 1971); *United Aircraft Corp* v. *Canel Lodge 700, I.A.M.,* 77 LRRM 3167 (D. Conn. 1971).

It would be ironic, as the Board recognized, if the parties' agreed upon procedures to de-escalate any remaining bitterness and animosity resulting from the 1960 strike now should be shunted aside and disregarded because of a prior finding of the existence of such bitterness and animosity.

The Nature of the Violations Found by the Trial Examiner

In their overly long effort to convince this Court that the Board should not have invoked the *Collyer* case to defer the incidents litigated in this proceeding to arbitration, the Petitioner Unions exaggerate out of all proportion the nature of the violations of the Act found by the Trial Examiner. In so doing they ignore completely the fact that the Trial Examiner absolved the Company from any violation of the Act on the vast majority of the allegations of the Complaint including 80% of the harassment and discrimination charges, the charges of failure to give the Unions timely notice of layoffs, two of the three charges of failure to provide shop stewards, and certain of the charges relating to information provided the Unions on merit rating grievances.

With respect to the comparatively few allegations of the Complaint upheld by the Trial Examiner over the two-year period in which the General Counsel had collected the Petitioner Unions' charges, only one incident involved a back pay order, and that was a two-week suspension.

In view of the disposition of the case by the Board, it would unduly protract this brief to set out in detail the evidence with respect to each allegation of the Complaint. Since the basic approach of the Unions' brief is to grossly overstate the nature of the comparatively few violations found while ignoring the allegations of the complaint dismissed by the Trial Examiner, however, some perspective is required to demonstrate that the incidents involved are nothing more than the ordinary fall-out produced by the normal and wholesome conflicts existing in an organized plant. Petitioner Unions' brief would have this Court believe that such minor conflicts and tension signify an "anti-union" employer. To that extent they are out of touch with industrial realities. One would be highly suspicious, in fact, if the union-employer relationship did not emit the few sparks that illuminate this long record, for that would indicate either an employer who had abandoned its prerogative of managing the business or a union that had abandoned its responsibility of representing its members' interests. The National Labor Relations Act never assumed a millenium of conflict-free industrial experience. On the contrary, it institutionalized such conflicts and provided channels for their resolution.

Against that background, the incidents litigated in this record fail utterly to assume the proportions argued by the Petitioner Unions and demonstrate the wisdom of the Board's decision to remand disputes of this nature to the mechanism agreed to by the parties for the resolution of such disputes.

1. Incidents Involving Gary Raymond

A good example of the narrowly partisan role played by the Board's General Counsel in this case and in the overall series of cases instituted against this Company over the last decade is the proliferation of charges involving Gary Raymond. The Petitioners' brief would make it appear that what was involved was simply his two-week suspension for

misconduct and the Company's investigation of the matter. Actually the General Counsel's complaint devoted no less than six different subparagraphs (Paragraphs 7(h), (i), (v), (x), 8(a) and 9(a)) to conduct allegedly interfering with Raymond's rights under the Act.

Paragraph 7(h) of the Complaint related first to an incident which occurred on June 11, 1970 when Raymond requested a box of cleaning tissues from his foreman Heim. After Heim gave him a box of tissues, another employee named Stevenson asked Raymond how he had obtained the box of tissues. When Raymond told him, Stevenson then made a similar request of Heim. After this second request, Heim came down and took a portion of the tissues in the box he had given to Raymond and gave them to Stevenson, remarking that if Raymond spent as much time working as he did worrying and talking to Stevenson on Company time about cleaning tissues his performance might improve (J.A. 254-255; Tr. 1350, 2025-2026).

Difficult as it is to believe, the Board's General Counsel actually alleged that this incident involved a harassment of Raymond and an "unreasonably close surveillance" of him. The Trial Examiner of course found no such violation (J.A. 802).

Paragraph 7(h) of the Complaint next related to a separate incident on June 16, 1970 where foreman Heim questioned Raymond on whether the time Raymond was spending in investigating grievances was necessary. When Raymond said that it was necessary,[4] the matter was dropped (Tr. 2032-2033). The General Counsel's Complaint again alleged that this constituted harassment of Raymond. Again, the Trial Examiner found no such harassment (J.A. 802).

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[4] The parties' collective bargaining agreement provided that "interruptions of . . the shop steward's work assignments be as infrequent and as short duration as the grievance or complaint reasonably requires" (J.A. 596; G.C. Ex. 46, Art VII, Sec. 8, p. 25).

The third aspect of paragraph 7(h) of the Complaint dealt with another separate situation on June 25, 1970 when foreman Heim reprimanded Raymond for "jumping the clock" and leaving his work area before the buzzer. Raymond responded by telling Heim that he was sick and tired of Heim's "being on his ass about being away from his work area" (J.A. 256-257; Tr. 2029-2030). The Trial Examiner again found no violation (J.A. 802).

Paragraph 7(i) of the Complaint related to an incident on June 30, 1970 when Raymond met with a foreman named Bly to obtain Bly's disposition of a grievance. Although Bly advised Raymond early in the meeting that he was going to deny the grievance, Raymond wanted to reargue it. When Raymond started repeating himself Bly jocularly said something to Raymond in Japanese which he translated as meaning "you talk too much" (J.A. 334-336; Tr. 2338-2340). The Trial Examiner rejected the General Counsel's argument that this constituted harassment of Raymond (J.A. 802).

Unmentioned in Petitioners' brief was the uncontradicted evidence of a steady escalation of Raymond's baiting of Heim through the three months prior to the climactic episode on October 1, 1970. Thus on July 28, 1970 Raymond called Heim an "asshole" after an incident where Heim had motioned Raymond to leave a congested area in which a man had been injured (Tr. 2035-2036). On August 28, 1970, in handling a grievance for an employee named Perry, Raymond accused Heim of being sneaky and underhanded in the way Heim had observed Perry and told Heim that Heim had lied to him in the past. When Heim asked for specifics, Raymond declined to provide them (Tr. 2037-2038). On September 4, 1970 when Heim was giving his disposition of the Perry grievance, Raymond interrupted him and told him that he didn't have to listen to Heim's "hot air" and accused Heim of a "personal blow at the steward" (Tr. 2038-2040).

Paragraphs 7(v), 8(a) and 9(a) of the Complaint dealt with the events on October 1, 1970. On the morning of that day Raymond asked Heim for his new merit rating and Heim said he would be back to him later in the day. In the afternoon Heim had Raymond come to his desk and permitted Raymond to copy his current merit rating. Raymond then started asking Heim questions recommended by the union [5] for challenging merit ratings such as the standards the foreman used in the rating. Predictably, Heim's responses did not satisfy Raymond and Raymond announced his intention to file a grievance. Later that day Raymond punched out on union business to speak to Heim about his own merit rating. The Trial Examiner found that the following then ensued:

> "The men got into a heated argument during which Raymond used vulgar epithets. Heim waived a pencil at Raymond, who knocked it out of his hand. Heim ordered Raymond back to work. Raymond refused to leave until Heim would sign his grievance. Heim called the personnel department. He then signed the grievance . . ." (J.A. 802).

The "vulgar epithets" admittedly used by Raymond were his accusation during this encounter that Heim was "an ass" and "full of shit" (J.A. 206; Tr. 1396).

Despite the steady drumbeat of verbal abuse directed at Heim by Raymond since the cleaning tissue games played by Raymond in early June, the Trial Examiner nevertheless credited Raymond's self serving statement that he acted "instinctively" in knocking the pencil out of Heim's hand on October 1 (J.A. 803). The Trial Examiner made no finding with respect to Raymond's insubordinate refusal to return to work when ordered to do so by Heim.

Even had the Board decided to pass on this incident of "strained relations," as characterized by the Trial Ex-

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[5] See J.A. 722, Resp. Ex. 65 (c).

aminer, on its merits, it is apparent that the decision of the Trial Examiner would have to be overruled since Raymond was clearly the aggressor in the incident and his belated excuse of "instinctive" reaction in striking the pencil from Heim's hand is flatly contradicted by his three-month verbal baiting of Heim.

In any event, the incident hardly rises to the level where the NLRB and this Court, rather than an arbitrator, should pass on its ultimate merits. The record is uncontradicted that the Company sought to have this matter settled by arbitration,[6] and agreed to its withdrawal from arbitration only after the Trial Examiner, over the Company's objection (J.A. 187; Tr. 1345), insisted that it be litigated before him.

Paragraph 7(x) of the Complaint alleged that the Company's investigation of the Raymond incident of October 1, 1970, itself violated the Act because Raymond was "harassed" by Company investigators.[7]

The Trial Examiner made no finding that Raymond was in fact harassed and noted Raymond's testimony that the statement of the events of October 1, 1970 prepared by the investigators based on his conversation with them were "pretty much as I had said" (J.A. 202, 803; Tr. 1375).

The Trial Examiner nevertheless found a technical violation of the Act in the failure of the investigators to advise Raymond of his alleged right to have a union representative present during the interview (J.A. 803). The Trial Examiner based his reasoning on the Board's decision in *Quality Mfg. Co.*, 195 NLRB No. 42, enforcement of which was denied in 481 F.2d 1018 (4th Cir. 1973), *cert.*

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[6] J.A. 743, 747, 748, 751, 755; Resp. Ex. 89 (d), (e), (f), (g) and (j).

[7] The General Counsel's Complaint (Para. 7(w)) also alleged that another employee named Labbe who had witnessed a part of the October 1, 1970 incident and who was similarly interviewed by Company investigators was denied his rights guaranteed by Section 7 of the Act and was harassed, but the Trial Examiner found no such harassment (J.A. 804).

granted 42 U.S. Law Week 3610. A similar Board decision in *Mobil Oil Corp.*, 196 NLRB 1052, was similarly denied enforcement by the Seventh Circuit, 482 F.2d 842 (7th Cir. 1973). Thus even if the Trial Examiner's technical disposition of this issue were reviewed on its merits, it stands on legal grounds already rejected by two Courts of Appeal.

Once again, however, the contract (J.A. 523; G.C. Ex. 6, Art. VII, Sec. 10, p. 27) and uniform past practice under the contract (Tr. 784), specifies the extent of the Company's obligations to provide union representation for employees who have been disciplined, and disputes over such matters are subject to arbitration (J.A. 517; G.C. Ex. 6, Art. VII, Sec. 3(a)(30), p. 20).

2. Incidents Involving Sullivan

The general format of Petitioners' brief to this Court in its statement of "The Violations Alleged in the Instant Proceedings" deal only with the minority of allegations of the Complaint upheld by the Trial Examiner. Contrary to this general format, the Petitioners go into some detail (Pet. Typewritten Br., pp. 9-11) regarding the merits of Sullivan's three-day suspension. The Trial Examiner found that it was "unnecessary to determine whether Sullivan was suspended for his union activity" because the Company had already complied with an arbitration award[8] finding that the suspension was not for "just cause" (J.A. 804).

The Petitioners, nevertheless, by reference to their own witness' testimony seek to paint for this Court a picture of gross antiunion discrimination on the part of the Company in this incident. Rather than prolong this brief by a point-by-point rebuttal with regard to an allegation dismissed by the Trial Examiner, it suffices at this point to

[8] The Union participated in the arbitration only after being forced to do so by the District Court in an order dated January 25, 1971 (J.A. 759; Resp. Ex. 91(a), p. 3).

note that the arbitrator in the case described the matter as "a close case" and ruled that:

> "regardless of what the record in this case might prove to others, it does not convince me that the Company was guilty of illegal discrimination under the National Labor Relations Act when it suspended Sullivan" (J.A. 771; Resp. Ex. 91(a), pp. 15-16).

Paragraph 7(o) of the Complaint alleged that the interview conducted by Company investigator Porter of the matter leading to Sullivan's suspension constituted coercive and excessive interrogation of union and shop stewards under color of enforcing the Company's rules against union solicitation during working hours. The Trial Examiner found that in the course of his brief (one-half to one hour) interview with Sullivan, Porter asked Sullivan whether he had obtained the merit rating cards he was found distributing during working time from the Union,[9] and followed that question up with an inquiry as to how the merit rating cards came into his possession if he were not active in the Union (J.A. 805). The Trial Examiner then, without passing on the Complaint's allegations of coercive and excessive interrogation, concluded inexplicably that:

> "Evaluated against Sullivan's subsequent suspension, I find Porter's interrogation of Sullivan about his union activity violative of Section 8(a)(1) of the Act" (J.A. 805).

Considering that he found it "unnecessary" to pass on the legality of Sullivan's "subsequent suspension," the Trial Examiner's reference is puzzling at best. Porter's totally noncoercive and nonexcessive peripheral comments about Sullivan's union activities were aimed at nothing more sinister than ascertaining whether Sullivan had come into possession of the cards lawfully (as would be the case if he

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[9] It is undenied that the Company regularly distributes merit ratings to the Union (J.A. 624; see also *United Aircraft Corp.*, 192 NLRB No. 62, TXD at 66).

were active in the Union) or whether the cards might have been stolen. When Sullivan satisfactorily explained how he came into possession of the cards Porter properly and promptly dropped that aspect of the interview (J.A. 330; Tr. 2327).

The Petitioner Unions persist in maintaining that the statement drafted by Porter from his interview with Sullivan was "incomplete" because it failed to assert that he had not intentionally passed out the cards during working time (Pet. Typewritten Br., p. 13). The Trial Examiner, however, did not so find, and the statement signed by Sullivan in fact notes Sullivan's defense based on lack of intent to violate Company rules.[10]

3. The Company's Requirement for Passes To Take Materials Out of the Plant

The General Counsel alleged and the Trial Examiner found that the Company violated Section 8(a)(1) when foreman Lyman allegedly refused to grant passes to employee Gaskins to take union materials out of the plant and when foreman Robinson allegedly refused to give employee Havener a daily pass to take such materials from the plant (J.A. 800-801).

To place this micro-issue into perspective the Company introduced uncontradicted evidence in the record to show the following general background:

1. The Company's Supervisors' Employee Manual specifies the requirement[11] of and procedure for obtaining guard

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[10] Thus, the statement provided:

"I wish to state I was not doing this with any intent and was performing a good will gesture to Fiochette by getting him this.

I wish to state I realize I violated Company Rules by handing out these rate sheets after the start of the shift, but it was not done with intent on my part" (J.A. 680-681; G.C. Ex. 64 (D-1)).

[11] This requirement is well known to all employees. A booklet furnished to all Pratt & Whitney employees specifically provides that "If you carry a package

passes to take materials out of the plant. The manual states, *inter alia,* that:

"1. Guard Pass Form 145A must be issued when an employee:

a. Leaves the plant during working hours, except during lunch periods.
b. Works overtime and leaves the plant during the hours of a following shift.
c. Takes a package of any kind or tool box which must have been inspected by the department foreman or supervisor" (J.A. 720; Resp. Ex. 63).

2. The reasons for requiring the passes is three-fold: (a) the Company is a major defense contractor and is under strict security regulations from the federal government; (b) the Company has proprietary information it seeks to protect; and (3) the Company wishes to minimize the possibilities of theft (J.A. 355-356; Tr. 2626).

3. The guard passes come in books that are issued to foremen and certain other supervisory employees (J.A. 355-356; Tr. 2727). When an employee seeks to carry materials out of the plant, the procedure is for him to request a pass from his foreman. The foreman then has the responsibility of satisfying himself as to the nature of the contents of the package in order to fill in that portion of the form entitled "Items or Reasons." Generally, the foreman satisfies himself as to the contents of the package by merely asking the employee what it contains and taking his word. This is particularly true in the case of requests by union officials to take briefcases out the plant. However, the foreman on occasion will examine the material himself (J.A. 356-357; Tr. 2728-2729).

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into or out of the plant, have it open and ready for inspection. *Outgoing packages must be accompanied by a guard's pass signed by your foreman.* Your cooperation in these respects will save considerable delay and inconvenience to yourself" (J.A. 700; G.C. Ex. 87, p. 36 (Emphasis added)).

4. The foreman and person to whom the pass is issued sign the pass, with the foreman retaining a copy. The employee then presents the pass to the guard as he leaves the premises. The guards will stop any employee carrying out a briefcase, tool box or other package (other than a lunch box) and ask the employee for his pass. The guard examines the pass and is instructed to make a physical check of the contents of the package to insure that it corresponds with the description on the pass. The guard then turns the pass into guard headquarters. All passes, which are numbered, are then accounted for to insure that every pass is turned in (J.A. 355-356; Tr. 2727-2728).

5. At East Hartford over 80,000 such passes were issued in 1970 and at Middletown over 10,000 such passes were issued in the same year. Only a "miniscule" proportion of the passes issued were requested by union officials for their papers (J.A. 357; Tr. 2729).

6. The Company has a policy against issuing passes for more than one day except in the limited instance of students enrolled in an apprentice program or Company sponsored training program where a pass is good for a month (or, more precisely, the unexpired portion of the calendar month in which the pass is issued) to be used to carry textbooks in or out of the plant (J.A. 357; Tr. 2730).

The record showed that on a *single* occasion—April 23, 1970—Gaskins had difficulty with an unidentified guard in taking his briefcase out of the plant without a pass. The Trial Examiner found that when Gaskins brought this to the attention of his foreman, Lyman, Lyman told Gaskins he would give him a pass anytime he wanted to take union materials out of the plant in connection with investigating a grievance or a grievance meeting. Between April 24, 1970 and July 27, 1971, Lyman issued 18 briefcase passes to Gaskins (J.A. 800).

Apparently the only point of criticism in the Trial Examiner's decision is that Lyman should have advised Gaskins that he would grant him a pass to take union materials out of the plant whether or not it was in connection with the investigation of a grievance or a grievance meeting. The record discloses no request by Gaskins for a pass after April 24, 1970 that was ever refused.

With respect to the Havener incident, the record showed that starting in April of 1970 Havener started requesting a pass from foreman Robinson on a more or less daily basis. After this continued for several weeks, Robinson told Havener that he would not give blanket daily passes to him but that passes would be issued when they were necessary and that Robinson would have to fill out that item in the form that specified "Items or Reasons." Havener by his own admission refused to give any reason, simply alleging that it was necessary to take the materials out (J.A. 140-151; Tr. 1174-1186).

The Trial Examiner found that the Company's refusal to grant Havener "daily passes"—whatever that means—was a violation of Section 8(a)(1) of the Act.

However, even if the Trial Examiner's findings of fact are correct—and they are not—these petty disputes were fleeting, and inconsequential. In each case the employees involved were simply trying to wangle some exception to a rule published by the Company to all employees.

4. Other Alleged Harassment

The Trial Examiner also found that the Company violated Section 8(a)(1) of the Act by the allegation that foreman Lyman did not afford shop steward Gaskins the same privilege afforded to other employees of engaging in a few minutes of nonwork-related conversations because he was a shop steward (J.A. 800).

The background of this charge was about four occasions between April and October of 1970 when foreman Lyman orally cautioned Gaskins for excessive talking during working hours. There was no dispute that Gaskins had engaged in nonwork-related conversations during working hours on the four occasions. The sum and substance of this allegation is that the Trial Examiner believed that the oral caution was out of order because other employees were permitted to engage in nonwork-related conversations of a few minutes duration. The Trial Examiner completely ignored the uncontradicted testimony of Lyman that he had cautioned at least five other named employees in his department for excessive nonwork-related conversations on Company time (J.A. 407-408; Tr. 3077-3078), thus undercutting his major premise that others in the department were permitted to do what Gaskins had been cautioned against doing.

At the very least, the Trial Examiner was on extremely tenuous ground in substituting his judgment for that of the supervisor involved of precisely when and under what circumstances an employee should be orally cautioned for excessive talking in relation to other employees similarly situated.[12]

The Trial Examiner found that the Company violated Section 8(a)(1) of the Act by supervisor Kane's statement to newly elected shop steward Russell Lee that Kane expected Lee to follow the contract 100% and that Lee, as a shop steward, would be more harshly dealt with for a violation of Company rules than any other employee.

Kane denied ever telling Lee that he would be dealt with more harshly for violation of Company rules as a shop steward (J.A. 234-239; Tr. 1695-1701), and Lee's own contemporaneous hand written account of his conversation with

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[12] The Trial Examiner dismissed another allegation of the Complaint alleging harassment of Gaskins by Lyman for passing out merit ratings to employees during the lunch hour (J.A. 800).

Kane fails to contain the crucial alleged comment about being dealt with more harshly as a shop steward (J.A. 59-60; Tr. 876-877).

The Trial Examiner thus appears to have credited Lee's testimony over that of Kane without ever acknowledging a conflict in the testimony or giving his reasons for crediting one version of the incident over the other. This is all the more strange since in another of Lee's complaints of alleged harassment involving General Foreman Galuska's "excessive surveillance" of Lee's work, the Trial Examiner dismissed the allegation of Section 8(a)(1) interference, apparently discrediting Lee's testimony that Galuska could see him from the place Galuska was allegedly watching him and crediting Galuska's testimony that it would have been physically impossible for him to view Lee's work from that point (J.A. 804). Again, no reason was given by the Trial Examiner for crediting one version over another.

The alleged harassment of Lee by Kane thus boils down to a single incident resting solely on a very shaky credibility finding by the Trial Examiner.[13]

5. Alleged Refusal to Call Stewards

The General Counsel's Complaint alleged three separate incidents involving an alleged refusal of a foreman to call a steward at an employee's request.

The Trial Examiner dismissed one such allegation outright (alleged failure to call a steward for employee Avery —Para. 12(c) of Complaint). He effectively dismissed another such allegation (alleged failure to call steward for employee Urbanowicz—Paras. 12(i) & (j) of the Complaint) on the basis that the parties had already arbitrated the

[13] The record was uncontradicted and the Trial Examiner found that on the very next day after Kane's conversation with Lee, Kane expressly told Lee that he had not intended to threaten Lee by the comments of the previous day (J.A. 804).

precise issue of whether a steward should have been provided for Miss Urbanowicz. Despite the fact that the Trial Examiner thus found it "unnecessary to determine whether Urbanowicz was unlawfully denied the services of a shop steward" (J.A. 808), the Petitioners in their brief to this Court nevertheless seek to replow the facts underlying that incident as if it were a live controversy (Pet. Typewritten Br. pp. 27-28).

With respect to employee Rogers, the Trial Examiner found that foreman "Kasden failed to summon a shop steward as required by the union contract. I find his refusal to do so violated Section 8(a)(5) and (1) of the Act" (J.A. 808).

As found by the Trial Examiner, Rogers requested a union steward at a time he was presented with and requested to sign and acknowledge receipt of an adverse "employee report." Rogers insisted upon seeing a steward prior to such acknowledgement, and when he declined to sign the employee report, it was signed in Rogers' presence by assistant foreman Robinson.

The agreement between the parties provided the following:

> "An employee who has been discharged or given a disciplinary suspension, shall before leaving the plant be permitted to see the shop steward for the area in which he worked at a location designated by the Company if he requests this privilege of the foreman" (J.A. 523; G.C. Ex. 6, Art. VII, Sec. 10, p. 27).

The uniform Company policy, as outlined in the Supervisor's Training Manual (J.A. 551; G.C. Ex. 39 (a), p. 9), and as testified to by Mr. Morse without contradiction (Tr. 783), is that the "practice is not to call the steward until disciplinary action is complete." As stated by Mr. Morse:

> "[M]anagement has reserved—and the Union has not questioned it—its right to consummate the discipline

and not seek the approbation of the steward, before the supervisor carries out the discipline" (Tr. 784).

As Resp. Ex. 58, J.A. 717, demonstrated, in 1969, 1970 and the first five months of 1971, there were some 2,048 calls for stewards at the East Hartford plant. On only 14 occasions over that time period was a refusal to provide a shop steward grieved by the Union. For the same period in Middletown, there were 605 calls and only 2 grievances over refusal to provide stewards. Thus, in practical terms, the "problem" being discussed here is a miniscule one, occurring in total in less than one per cent of all calls for shop stewards.

An independent legal basis for dismissing the Complaint as it related to the Rogers incident is to be found in *United Aircraft Corp.*, 192 NLRB 382 (1971). There the Board under factual circumstances similar to those present in this case exonerated this Company from any wrongdoing. In that case the Board held:

> "With respect to the subject of steward representation, the evidence established that on several occasions Respondent's foremen refused the request of individual employees for the immediate services of a union steward when a dispute arose over such issues as overtime, assignment of work, and absences. In most cases, however, the affected employees did, shortly thereafter, on their own or through the medium of their respective supervisors, achieve steward representation prior to any disciplinary or other adverse action. In other instances [in which disciplinary action was imposed before the requested steward was called], where the foreman determined that his action did not constitute a violation of the existing contract, the employee, in accordance with the contract in effect, subjected his complaint to the grievance procedure. In these circumstances, we deem the evidence insufficient to warrant a finding of violation of Section 8(a)(5)." (192 NLRB 382 at pp. 388-389).

The Rogers incident was simply one in which the employee requested a steward before the completion of the

disciplinary action, and under the contract the steward is to be summoned only after the disciplinary action is completed.

Finally, a close reading of the record could also well support a conclusion that the entire incident was nothing more than an example of a misunderstanding between the parties. Compare J.A. 182-186, Tr. 1332-1338, with J.A. 243-247, Tr. 1788-1793 and J.A. 248-251, Tr. 1805-1808.

6. Alleged Refusals To Supply Information to Unions in Merit Rating Grievances

The Trial Examiner ruled that the Company did not violate the Act by its alleged failure to provide the Union with the "standards" used by foremen in making merit ratings (J.A. 813), and by its alleged failure to provide the Union with records at the first step of merit rating grievances (J.A. 814). The Trial Examiner found a violation of the Act by the Company's alleged refusal to provide certain records to the Union at Step 2 of the grievance procedure (J.A. 814-816).

The Petitioners' brief to this Court now makes accusations against the Company's procedure in merit rating grievances contained in neither the General Counsel's complaint nor the Trial Examiner's decision. Thus, for example, it complains that the Company "refused to settle grievances" at Step 1 merit rating grievances (Pet. Typewritten Br, p. 30). In fact, the Petitioners' brief conveniently overlooks the fact that the entire matter of production of information in grievance meetings is explicitly covered by their own collective bargaining agreement with the Company and most of the alleged inequities claimed in their brief result directly from a procedure that they themselves agreed to in collective bargaining.

Thus, for example, the procedures agreed to in the agreement do not contemplate the furnishing of any information or records at the initial step of the procedure.

At Step 2 of the grievance procedure the agreement specified that:

> "The Company will produce such pertinent existing production, payroll, attendance records and disciplinary notices pertaining to the employee as may be necessary to the settlement of a grievance at [the second step] of the grievance procedure" (J.A. 512; G.C. Ex. 6, Art. VII, Sec. 1, Step 2).

The record showed that this clause had been in the contract in substantially the same form since 1950 (Tr. 2559), despite continuing unsuccessful efforts by the Union in collective bargaining throughout the following two decades to enlarge the scope of the records to be produced and to require production at Step 1 (Resp. Rej. 50, 51, 53, 55, 56(a), 56(b)).

Long before the *Collyer* case the Board held in *Hearst Corp.*, 113 NLRB 1067, 1071-1072 (1955), that the Board would not lend its processes to a union attempt to obtain records in merit rating grievance processing which exceeded the scope of such information to be produced agreed to by the parties in a collective bargaining agreement. In that case the Board held:

> ". . . For the controlling fact that clearly emerges from the entire course of the parties' bargaining is that the Union, having proposed an 'information' clause for the 1953-1955 contract more inclusive than the one in the 1952-1953 contract, consciously yielded in the face of the Respondent's objections, and accepted something less than it originally proposed. What the parties ultimately agreed upon, moreover, was the 'information' clause of the 1952-1953 contract modified to include a part of the Union's original proposal. And this agreement was in fact written into the express terms of the bargaining contract the parties executed.
>
> "In these circumstances, we believe it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some three months later, to disturb the terms of the bargain

> the parties themselves achieved. The give and take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other party to the agreement had every good reason to believe had been stabilized for a definite period."

Thus to the extent that the Union Petitioners are now still complaining in their brief to this Court of the way in which their agreement specifically limits the production of records to the Union, their complaint is clearly not well taken.

To the extent that their complaint concerns merely whether the Company complied with the contractual provision on production of records at Step 2, that issue is clearly subject to the grievance and arbitration provisions of the agreement (J.A. 517; G.C. Ex. 6, Art. VII, Sec. 3(a)(22)).

Even the Trial Examiner's narrow finding, which in effect ruled that the Company had not complied with the provision in the contract for production of records at Step 2, was erroneous.

Thus, for example, the record showed that the request for records at Step 2 was limited to only those records *relied* upon by the foreman in rating the grievant (Tr. 3173).[14] With the possible exception of the foreman's note-

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[14] See Resp. Ex. 81 (Eslinger Step 2 minutes); Resp. Ex. 82 (McNamara Step 2 minutes); Resp. Ex. 83 (Huestis Step 2 Minutes); Resp. Ex. 84 (Gould Step 2 minutes); Resp. Ex. 85 (Fisher Step 2 minutes); J.A. 561, G.C. Ex. 40(b) (De Raffaele Step 2 minutes); J.A. 567, G.C. Ex. 40(f) (Doolittle Step 2 minutes); J.A. 572, G.C. Ex. 40(g) (Havener Step 2 minutes); J.A. 565, G.C. Ex. 40(c) (Zura Step 2 minutes).

books, the evidence uniformly disclosed that the foremen did not rely on production records in making their ratings (Tr. 3173).

The factual error then made by the Trial Examiner when this evidenciary lapse became evident was to convert the Union's request from a request for the records relied upon by the foreman to a request for all records "bearing on the employee's work performance" (J.A. 815). But such a request was simply never made in accordance with the evidence cited above.

As far as the foremen's notebooks were concerned, they were simply personal observations recorded by some of the foremen in notes maintained by themselves. Some kept notebooks; others did not. They were not kept pursuant to Company instructions and were not recorded on Company furnished forms. They followed no uniform format and were simply the *ad hoc* impressions of various matters recorded by some of the foremen (Tr. 737-740, 807). Giving the term "production record," as used in the agreement, its usual natural meaning, there is no way that these informal notes can be called a "production record."

There was, moveover, no showing that the "production records" were, in the words of a previous *United Aircraft* case, 192 NLRB 382, 423 (1971), "necessarily essential or required" for collective bargaining, as opposed to being merely "interesting or useful" for that purpose. This same Union has previously been found by the Board in the case cited above to have a proclivity "to have in its own office a counterpart of all Company personnel records in tabulated form for quick and ready reference in the promotion and handling of grievances". 192 NLRB at 423.

It was proved in the present case that the Union requests for records in Step 2 merit rating grievances were not individual requests geared to individual needs in specific situations where the production of the record would,

in the words of that portion of the contract dealing with Step 2 grievances, "be necessary to the settlement of the grievance . . ." Rather the record showed that the request for records was simply a stereotyped, blanket demand made routinely by the Union in all merit rating grievances [15] pursuant to written Union instructions to stewards to do so (J.A. 731-734; Resp. Ex. 79).

Given the Unions' long history of hostility toward the merit rating system itself (See, e.g., Resp. Rej. Ex. 68, 68A, 69) and their unsuccessful efforts to change the system in collective bargaining, it should have been evident that the Union's blanket requests for records in all Step 2 merit rating grievances had the dual purpose of (1) converting the grievance procedure into a "fishing expedition" to obtain records and (2) to make the merit rating system so onerous and burdened with irrelevant record production requirements that it would sink under its own weight and be replaced with the Union's goal of automatic progression.

The Alleged Violations in Case No. 1-CA-7890 et al.

Not content with exaggerating the record in the present case in an attempt to persuade this Court to reverse the Board's decision to channel the disputes revealed by this record through the parties' grievance and arbitration procedures, the Petitioner Unions reach out and recite allegations made in an unfair labor practice proceeding instituted after this case. Since the case was handled by summary judgment procedures, the allegations of fact appearing on pp. 34-36 of the Petitioner's typewritten brief are nothing more than the General Counsel's offer of proof.

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[15] See the written grievances of Eslinger (J.A. 729, Resp. Ex. 73); McNamara (Resp. Ex. 76); Huestis (Resp. Ex. 72); Gould (J.A. 728, Resp. Ex. 71); Fisher (Resp. Ex. 75); Oliviera (J.A. 730, Resp. Ex. 74); De Raffaele (J.A. 694, G.C. Ex. 73); Doolittle (G.C. Ex. 76); Havener (G.C. Ex. 72); Zura (Resp. Ex. 4).

When Petitioners' brief was written, the Board had not yet decided the case.

The Board decided the case on September 3, 1974, granting the Company's motion for summary judgment and dismissing the Complaint with the same *caveat* invoked in the present case—that the Board would retain jurisdiction pending a contractual resolution of the matter resulting in a disposition in a manner not repugnant to the Act. *United Aircraft Corp.*, 213 NLRB No. 22, 87 LRRM 1069 (1974).

For all of the Petitioners' rhetoric about what the General Counsel offered to prove in the case, the Board disposed of those allegations with the following comment:

> "The allegations set forth in paragraph 9(a), (b), and paragraphs 10 and 11 of the complaint involve a conflict between a single employee and his immediate supervisors, which occurred on or about July 1, 1971; the allegations of paragraph 9(c) involve the content of disputed conversations, between a single employee and his immediate supervisors occurring on or about April 14, 1971. As noted above, no grievances have ever been filed over these disputes. Thus, the allegations of paragraphs 9, 10, and 11 are essentially limited to isolated acts involving two employees, each of whom work at a separate plant. We note that the parties involved in *United Aircraft Corporation, supra,* and those involved herein are the same, and that the nature of the allegations contained in the instant complaint are also the same. Therefore, the only issue before us is whether the allegations of the instant complaint are subject to voluntary adjustment through the parties' grievance and arbitration provisions. We think that they are. All of the alleged acts of harassment and discrimination contained in paragraphs 9, 10, and 11 of the complaint, it seems to us, could also be resolved by the parties' grievance procedures, since there appears to be no question but that they are covered by the provisions of the contracts providing for arbitration on the request of either party if the dispute is not settled under the grievance procedures (the contracts with Lodges 700, 743, and 1746 have identical

grievance and arbitration provisions)'' (footnotes omitted) 87 LRRM at 1071-1072.

Needless to say, the Board saw through the gloss Petitioners seek to paint on these wholly unremarkable day-to-day frictions in industrial life and ruled that such incidents be deferred to the grievance and arbitration procedures of the contract.

ARGUMENT

The Board Properly Deferred the Incidents Litigated to the Grievance-Arbitration Provisions of the Collective Bargaining Agreement

While the Petitioners raise the issue of the validity of the *Collyer* case, 192 NLRB 837 (1971), they do not press it in their brief to this Court (Pet. Typewritten Br., pp. 76-79). The reason for this is quite apparent. Every Court of Appeals that has considered the validity of *Collyer* has upheld it and the Supreme Court on October 14, 1974 denied *certiorari* in two of these cases.[16] The affirmation of the *Collyer* principle by this Court in *Nabisco Inc.* v. *NLRB,* 479 F.2d 770 (2nd Cir. 1973), was unequivocal. In support of the Board's rationale this Court pointed to the language of Section 1 of the Act ''encouraging practices fundamental to the friendly adjustment of industrial disputes,'' and the language of Section 203(d) of the Act providing that ''Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.'' In addition, this Court adverted to the Sen-

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[16] *Nabisco, Inc.* v. *NLRB,* 479 F.2d 770 (2nd Cir. 1973); *Associated Press* v. *NLRB,* 492 F.2d 662 (D.C. Cir. 1974); *IBEW, Local 2188* v. *NLRB,* 494 F.2d 1087 (D.C. Cir. 1974), *cert. denied,* 87 LRRM 2398; *Enterprise Publishing Co.* v. *NLRB,* 493 F.2d 1024 (1st Cir. 1974); *Provision House Workers Union Local 274* v. *NLRB,* 493 F.2d 1249 (9th Cir. 1974), *cert. denied,* 87 LRRM 2397.

ate Report on the Taft-Hartley Act encouraging the settlement of disputes under the contracts in preference to resolution by the Board. That report expressly noted that "any other course would engulf the Board with a vast number of petty cases that could best be settled by other means" S.Rep. No. 105, 80th Cong., 1st Sess., p. 23.

This Court concluded in the *Nabisco* case that:

> "We cannot say that the Board abused its discretion in the present case in reaching the conclusion that federal labor law policy would be furthered by giving the grievance procedure a chance to work while retaining jurisdiction to step in if it did not" 479 F.2d at 773.

Since this Court's *Nabisco* decision, the Supreme Court in *Arnold Co.* v. *Carpenters District Council,* 94 S. Ct. 2069, 86 LRRM 2212 (1974), quoted at length with approval from the Board's *Collyer* decision and noted that:

> "Indeed Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure" 86 LRRM at 2214.

Faced with this solid judicial precedent upholding the Board's *Collyer* approach, the bulk of the Petitioners' argument is directed to alleged reasons why the principles of the *Collyer* case should not be applied to this case.

While several differently styled arguments are propounded, most of them boil down to the Petitioners' claim that *Collyer* should not be applied because of past findings by the Board that the Company committed unfair labor practices. We have reviewed earlier in this brief this unique history of nearly continuous complaints being issued against this Company by the Board's General Counsel in the last fourteen years and the relative handful of viola-

tions uncovered in relation to the mass of charges which were found to have no merit. In the largest of these cases, *United Aircraft Corp.*, 192 NLRB 382, now before this Court in Cases Nos. 72-1935 & 2310, the hearing alone consumed some 267 hearing days over a five year period resulting in a record of 30,315 transcript pages and enough exhibits to fill a small room. Despite the massiveness of the Complaint, the Board largely exonerated the Company in that case. It is simply inevitable that continuous prosecution by the General Counsel on nearly every charge that the Petitioners could dream up over a fourteen year period will disclose some violations of the Act.

Based on the meager harvest from the abundance of charges filed and prosecuted, the Petitioners now seek, by drumbeat more than anything else, to proclaim that this Company has a history of hostility to the Act. Thus, no fewer than eight times in the course of their brief do they refer to this Company as a "recidivist." They go back to Volume 1 of the Board's reported cases and to a 1937 Senate Report in this effort to justify their grossly exaggerated characterizations (Pet. Typewritten Br., p. 8 n.8).

The Board properly evaluated this background by reference to the large employee complements involved in the three plants in question, the relatively few allegedly offending, low level supervisors and the "minor" nature of the allegations involved (J.A. 844-845).

Balanced against this background, the Board took into consideration the obvious willingness of the Company to submit disputes arising under the contracts to the grievance and arbitration procedures of the contracts and observed that "there is positive evidence of the maturation of the collective bargaining relationship" (J.A. 847). The Board then concluded:

> "We are therefore willing to proceed on the assumption that the procedures which have shown to work well can and will work effectively again to resolve the

> disputes here. At least we think there is sufficient promise of such result to justify a temporary withholding of our processes and to give the parties an opportunity to make their own machinery work'' (J.A. 847-848).

The Petitioner Unions dispute nearly every word of the above stated findings. There can, however, be no factual dispute about either the size of the employee complements involved or the small number of low level supervisors involved in the alleged violations.[17] In the portion of this brief entitled ''Nature of the Violations Found by the Trial Examiner'' we have shown that the miscellany of charges collected over a two year period and dropped into the Complaint in this case involve precisely the kind of ''petty'' disputes that Senate Report quoted by this Court in the *Nabisco* case envisaged would not ''engulf the Board,'' but should rather be handled by the parties' grievance and arbitration procedures. While disputes such as Raymond's two-week suspension, the timing of the Company's furnishing of stewards, the interpretation of the Company's gate pass policy, alleged harassment of individuals not resulting in any disciplinary action, and the records to be disclosed by the Company at Step 2 merit rating grievances may have a significance to the parties in their on-going relationship, they have little or no significance as matter of federal labor law to be adjudicated by the Board through extensive and unwieldy, long after-the-fact hearings, trial adjudications, Board decisions and decisions by Courts of Appeal.

The Petitioners' brief suggests speculative deficiencies in resolving their disputes in the manner contemplated by their own agreement (Pet. Typewritten Br., pp. 47-49, 68-73). One answer to such speculation is that the Board order in this case expressly retains Board jurisdiction over the dispute ''solely for the purpose of entertaining an appro-

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[17] See pp. 3-4, *supra*, of this brief.

priate and timely motion for further consideration on a proper showing that either (a) the dispute has not with reasonable promptness after the issuance of the Decision here, either been resolved by amicable settlement in the grievance procedures or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act" (J.A. 848-849). Thus, if the Petitioner Unions believe that an arbitrator's award is, for some reason suggested by them in their brief, repugnant to the purpose of the Act, they still have recourse to the Board.

Another answer to the Petitioner Unions' specific complaint that arbitrators' awards are not backed by the sanction of contempt is that arbitrators' awards are enforceable in the federal court and a failure to abide by the provisions of a court enforced arbitration award could clearly lead to contempt proceedings.

The Petitioners pick up the dissenters' theme of irony in remanding the incidents covered by this Complaint to the grievance and arbitration procedures of the contract in the name of "promptness." The only irony the Intervenor sees is that the Petitioners, who have consistently sought to block prompt resolution of disputes by arbitration through resisting arbitration in Court [18] should now even be arguing a promptness issue. There is simply no doubt that if the matters litigated in this case, which dealt with incidents in 1969-1971, were submitted to arbitration, they would now be resolved. Even if, as the dissenters speculated, two arbitrations would be required to challenge both the employee's merit rating and the records to be produced at Step 2 of the grievance procedure, both such arbitrations would now be ancient history, while this case still plods its way through the courts.

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[18] See cases cited p. 10, *supra*.

To the extent that the Petitioners raise other arguments challenging the Board's application of the *Collyer* case to the present case, the Intervenor believes that the brief of the Board adequately answers such contentions and they will not be repeated in this brief.

CONCLUSION

For the foregoing reasons the Intervenor respectfully requests that the petition for review be denied and the decision of the Board be affirmed.

Respectfully submitted,

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